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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 DZ BANK AG DEUTSCHE  
11 ZENTRAL-  
12 GENOSSENSCHAFTSBANK,

13 Plaintiff,

14 v.

15 CONNECT INSURANCE AGENCY,  
16 INC.,

17 Defendant.

CASE NO. C14-5880JLR

ORDER ON MOTION TO  
DISMISS AND STRIKE

18 **I. INTRODUCTION**

19 Before the court is Plaintiff DZ Bank AG Deutsche Zentral-  
20 Genossenschaftsbank's ("DZ Bank") motion to dismiss Defendant Connect Insurance  
21 Agency, Inc.'s ("Connect") counterclaims pursuant to Federal Rules of Civil Procedure  
22 12(b)(1) and 12(b)(6) and motion to strike Connect's affirmative defenses pursuant to  
Federal Rule of Civil Procedure 12(f). (Mot. (Dkt. # 15).) The court has considered DZ

Bank's motion, all submissions filed in support thereof and opposition thereto, the balance of the record, and the applicable law. Being fully advised,<sup>1</sup> the court GRANTS in part and DENIES in part DZ Bank's motion. The court grants DZ Bank's motion to dismiss under Rule 12(b)(1) and dismisses Connect's counterclaims with prejudice and without leave to amend because it finds that amendment would be futile. The court, however, denies DZ Bank's Rule 12(f) motion to strike Connect's affirmative defenses.

## II. BACKGROUND

### A. The Present Suit

On November 5, 2014, DZ Bank filed the present action against Connect. (Compl. (Dkt. # 1).) DZ Bank alleges that Connect purchased the assets of various insurance companies, including Advantage Pacific Insurance, Inc. ("Advantage"), after Advantage's former franchisor, Brooke Insurance ("Brooke") failed.<sup>2</sup> (*See id.* ¶¶ 45-60.) DZ Bank asserts that Advantage had previously financed its acquisition of the Brooke agency assets through Brooke Credit Corporation ("BCC"). (*Id.* ¶¶ 20-30, Exs. 7-11.) DZ Bank alleges that Advantage used notes and security agreements to give BCC a

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<sup>1</sup> Neither party has requested oral argument, and the court deems it unnecessary for disposition of this motion.

<sup>2</sup> DZ Bank originally brought claims involving Connect's purchase of the assets of Choice Insurance, Inc., as well. (*See* Compl. ¶¶ 97-102 (Count I – Conversion of the Choice Collateral), ¶¶ 109-12 (Count III – Unjust Enrichment – Choice Collateral).) However, the parties subsequently stipulated to the dismissal of these claims along with Connect's counterclaims "as related to Counts I and III of DZ Bank's Complaint." (Stip. (Dkt. # 19) at 2.) Thus, DZ Bank's claims and Connect's counterclaims involving the transfer of Choice assets to Connect are no longer at issue.

1 blanket security interest in all of the respective agency assets, accounts, and rights to  
2 payment of Advantage. (*Id.*)

3 In its complaint, DZ Bank alleges that, prior to Brooke's failure, BCC assigned its  
4 rights under the notes and security agreements at issue here to DZ Bank. (*See id.* ¶¶ 3-8.)  
5 DZ Bank alleges that Connect purchased the assets of Advantage pursuant to agreements  
6 that damaged DZ Bank's rights in the pledged collateral. (*Id.* ¶ 72, Ex. 19 (attaching  
7 April 2010 Sale Agreement between Advantage and Connect).) DZ Bank does not allege  
8 that Connect, as purchaser of Advantage's assets, is an assignee of the rights of  
9 Advantage under the franchise agreements with Brooke or the notes with BCC. (*See*  
10 *generally id.*) DZ Bank alleges that Advantage defaulted on its obligations to DZ Bank  
11 in April 2011, after Advantage's owners had transferred the collateral pledged to DZ  
12 Bank to Connect. (*Id.* ¶¶ 72-96.)

13 DZ Bank asserts that it has an absolute, immediate, and unconditional right to  
14 collateral that was pledged to DZ Bank and that has now been transferred through a series  
15 of transactions to Connect. (*Id.* ¶ 104.) As a result, DZ Bank asserts claims for  
16 conversion and unjust enrichment against Connect regarding the Advantage collateral  
17 that is in Connect's possession. (*Id.* ¶¶ 103-08, 113-16.)

#### 18 **B. The Prior DZ Bank Action**

19 On October 25, 2011, prior to the present lawsuit, DZ Bank filed a complaint in a  
20 related matter against Advantage and a related company, API Vancouver, Inc. ("API").  
21 (*See DZ Bank AG Deutsche Zentral-Genossenschaftsbank Frankfurt AM Main v.*  
22 *Advantage Pacific Insurance, Inc., et al.*, No. C11-5879BHS, (W.D. Wash.) ("Prior DZ

Bank Action”), Compl. (Dkt. # 1).) Both Advantage and API were owned by David Coley. (*See* Compl. ¶¶ 1, 72-73.) In this prior action, DZ Bank alleged that Advantage, API, and Mr. Coley defaulted on their obligations to DZ Bank as the assignee of BCC and other Brooke entities. (Prior DZ Bank Action, Compl. ¶¶ 7-35.) Mr. Coley filed a pro se Answer on behalf of Advantage and API (*id.*, Answer (Dkt. # 9)), but the court struck the Answer as it pertained to the corporations because such business entities may appear in federal court only through a licensed attorney (*id.*, Order (Dkt. # 13)). On April 17, 2012, Mr. Coley filed for bankruptcy. (*See* Case No. 12-42638PBS (W.D. Wash. Bankr.).) On May 24, 2012, the court granted final default judgment pursuant to Federal Rules of Civil Procedure 54(b) and 55 in favor of DZ Bank against Advantage in the amount of \$214,678.38 and against API in the amount of \$327,689.21. (Prior DZ Bank Action, Order Granting Default Judgment (Dkt. # 24).) No defendant filed any counterclaims against DZ Bank in this matter. (*See generally* Prior DZ Bank Action, Dkt.)

### **C. Connect’s Counterclaims**

In its amended answer to DZ Bank’s complaint in the present action, Connect purports to assert counterclaims against DZ Bank (*see* Am. Ans. (Dkt. # 10) at 12 (Defendant, as and for its counterclaims against Plaintiff, alleges as follows . . . .”)); however, few of Connect’s allegations actually reference DZ Bank (*see generally id.*). Most of the factual allegations underlying Connect’s counterclaims describe an alleged

1 fraud perpetrated by “the Brooke Companies”<sup>3</sup> and “Brooke”<sup>4</sup> against their Franchisees,  
 2 which Connect defines as including Advantage and API.<sup>5</sup> (*See id.* ¶¶ 66-90.) The only  
 3 connection to DZ Bank that Connect draws regarding its allegations of fraud by Brooke is  
 4 Connect’s allegation that DZ Bank discovered Brooke’s fraud during the first quarter of  
 5 2008 and did not inform the Franchisees, but rather began “aggressively contacting” and  
 6 “inducing” the franchisees to sign ccknowledgments that DZ Bank was the owner of  
 7 notes issued to finance the purchase of the Brooke insurance franchises. (*Id.* ¶¶ 91-92.)  
 8 Connect also alleges that DZ Bank representatives used “threats and intimidation to  
 9 coerce the Franchisees to sign the Acknowledgements,” which “included waivers of all  
 10 defense relating to the transactions,” and foreclosed on the notes in October 2008. (*Id.*  
 11 ¶¶ 92-93.)

12 None of these allegations, however, indicate that DZ Bank acted in a fraudulent  
 13 manner toward Connect. Indeed, the only direct link that Connect draws between itself  
 14 and Advantage is in one paragraph of Connect’s counterclaim allegations. Connect  
 15 alleges that “Advantage Pacific ultimately failed and was . . . forced to sell its remaining  
 16 accounts to Defendant Connect.” (*Id.* ¶ 97.) Beyond acquiring these assets, Connect  
 17 does not allege that it acquired any other rights or obligations through Advantage. (*See*

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18 <sup>3</sup>Connect defines “the Brooke Companies” as Brooke Corporation, Brooke Capital  
 19 Corporation, and Aleritas Corporation. (Am. Ans. ¶ 66.) Brooke Corporation and Brooke  
 20 Capital Corporation filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code  
 on October 28, 2008, in the Bankruptcy Court for the District of Kansas, Case No. 08-22789.

21 <sup>4</sup> Connect defines as “Brooke” as the “Brooke Credit Corporation and its related entities.”  
 (Am. Ans. ¶ 67.)

22 <sup>5</sup> (*See* Am. Ans. ¶ 67.)

1 *generally id.*) Connect raises no allegation that the franchisees assigned any of their  
2 rights under the notes or franchise agreements to Connect. (*See generally id.*)

3 Connect's allegations contained in each of its specific counterclaims are also  
4 nearly devoid of facts related to either Connect or DZ Bank. For example, the paragraphs  
5 of Connect's counterclaim entitled "Breach of the Implied Duty of Good Faith and Fair  
6 Dealing" reference only "the Brooke Companies," "Brooke principals," and "Brooke."  
7 (*Id.* ¶¶ 99-102.) DZ Bank is not mentioned in these paragraphs at all. (*See id.*) The same  
8 is true of paragraphs entitled "Fraud in the Inducement (Brooke)" (*id.* ¶¶ 105-08),  
9 "Actual Fraud" (*id.* ¶¶ 113-17), and "Breach of Contract" (*id.* ¶¶ 118-23). These  
10 paragraphs only reference "the Brooke Companies," "Brooke," or "Brooke  
11 representatives." (*Id.* ¶¶ 99-102, 105-08, 113-17.) DZ Bank is not referenced. (*See id.*)

12 Connect also alleges a counterclaim entitled "Equitable Estoppel." (*Id.* ¶¶ 103-  
13 04.) In this counterclaim, Connect alleges that "[t]he Franchisees reasonably relied to  
14 their detriment on the misleading statements, omissions, and actions of Plaintiff and/or  
15 Plaintiff's assignor . . . ." (*Id.* ¶ 103.) Nowhere in this counterclaim does Connect allege  
16 that it relied to its detriment on DZ Bank's or anyone else's misleading statements,  
17 omissions, or actions. (*See id.* ¶¶ 103-04.)

18 Similarly, Connect alleges a counterclaim entitled "Fraud in the Inducement (DZ  
19 Bank)." (*Id.* ¶¶ 109-12.) In this counterclaim, Connect alleges that "the Franchisees  
20 relied to their detriment on the misleading statements, omissions, and actions of DZ  
21 Bank . . . ." (*Id.* ¶ 109.) However, as noted above, the term "Franchisees" does not refer  
22 to Connect, but rather to Advantage and API, who are not parties to this lawsuit. (*See id.*)

¶ 67.) In addition, Connect alleges that “Brooke representatives knew these representations were false,” and that “[t]he Franchisees reasonably relied on the Brooke Companies’ false and misleading actions and representations.” (*Id.* ¶¶ 110-11.) There are no allegations in this counterclaim that Connect reasonably relied on anything. (*See id.* ¶¶ 109-12.)

Despite the lack of any allegations that the franchisees’ rights or defenses on the notes or franchise agreements were assigned or transferred to Connect, Connect nevertheless asserts that it is entitled to bring any claim or defense that “the Franchisees” could have brought against Brooke. Indeed, Connect describes its position as follows:

DZ Bank’s entire claim is premised on its allegation that Connect is obligated under the security agreement for general intangibles and other collateral and proceeds purportedly pledged by Advantage [] to DZ Bank [and later transferred to Connect]. . . . Thus, DZ Bank’s security interest is subject to all terms of the integrated franchise agreement transaction between Advantage []/API and Brooke, and Connect is entitled to all defenses and counterclaims in recoupment arising from the integrated franchise transaction that gave rise to the contract.

(Resp. (Dkt. # 22) at 7.)

DZ Bank brings its motion to dismiss Connect’s counterclaims on several grounds. First, DZ Bank argues that Connect’s claims must be dismissed for lack of standing and therefore subject matter jurisdiction. (Mot. at 5-9.) DZ Bank argues that Connect has not alleged that it was assigned Advantage’s rights under the franchise agreements with Brooke or the notes assigned to DZ Bank. (*Id.* at 6-8.) DZ Bank asserts that Connect’s allegations are insufficient to establish that Connect is in privity with Advantage. Thus, DZ Bank argues that Connect has no standing to assert Advantage’s claims against either

the Brooke entities or DZ Bank, and its counterclaims must be dismissed for lack of standing and subject matter jurisdiction. (*Id.* at 8-9.) Second, DZ Bank asserts that even if Connect is in privity with Advantage, its counterclaims are barred by the doctrine of res judicata or the compulsory counterclaim rule. (*Id.* at 9-18.) DZ Bank asserts that, to the extent that Connect argues that it stands in the shoes of Advantage, Connect is bound by the failure of Advantage to raise the counterclaims asserted by Connect here in the previous related lawsuit involving Advantage and DZ Bank. (*Id.*) Finally, DZ Bank argues that many of Connect's affirmative defenses mirror the assertions in its counterclaims, and therefore the affirmative defenses should be struck on the same grounds. (*Id.* at 18-20.)

The court now addresses DZ Bank's motion.

### III. ANALYSIS

#### A. DZ Bank's Motion to Dismiss Connect's Counterclaims Pursuant to Rule 12(b)(1)

DZ Bank brings part of its motion to dismiss Connect's counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(1). (*See Mot.* at 5-9.) To the extent that DZ Bank's motion is based on the contention that Connect lacks standing to assert its counterclaim, the motion is properly characterized as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *NovelPoster v. Javitch Canfield Group*, No. 13-cv-05186-WHO, 2014 WL 5687344, at \*3 (N.D. Cal. Nov. 4, 2014). A challenge under Rule 12(b)(1) may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where, as here, the challenge is facial—meaning that it is confined to whether the

1 allegations are sufficient “on their face” to invoke federal jurisdiction, *Safe Air for*  
2 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)—the court assumes the  
3 allegations to be true and draws all reasonable inferences in the complaining party’s  
4 favor, *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The court may grant a  
5 Rule 12(b)(1) motion when the complaint on its face fails to allege sufficient facts to  
6 establish subject matter jurisdiction. *See Safe Air for Everyone*, 373 F.3d at 1039.

7 Article III of the Constitution limits federal court jurisdiction to cases and  
8 controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). The court  
9 assesses justiciability as of the time the complaint is filed. Standing is a “core  
10 component” of a case or controversy. *Id.* at 560. The party seeking to invoke federal  
11 jurisdiction bears the burden of establishing all three elements of constitutional standing:  
12 (1) that it suffered an “injury in fact” that is “concrete and particularized” and “actual or  
13 imminent,” (2) that a “causal connection between the injury and the conduct complained  
14 of” exists that is fairly traceable to the opposing party’s action, and (3) that the injury  
15 likely can be redressed by a favorable decision. *Id.* at 560-61. In the absence of  
16 standing, a federal court lacks subject matter jurisdiction over the claim. *Righthaven,*  
17 *LLC. v. Hoehn*, 716 F.3d 1166, 1172 (9th Cir. 2013).

18 Lawsuits by assignees of contract rights satisfy Article III standing requirements.  
19 *Sprint Comm’s Co., LP v. APCC Servs., Inc.*, 554 U.S. 269, 285-86 (2008). Connect,  
20 however, has not alleged that it is an assignee of any of the contract rights of the  
21 Franchisees that Connect asserts in its counterclaims. (*See generally* Am. Ans.) Indeed,  
22 Connect does not deny DZ Bank’s assertion that Connect was not assigned any such

1 rights and is not otherwise in contractual privity with the Franchisees. (*See generally*  
 2 Resp.)

3 Instead, Connect asserts that as the transferee of Advantage's collateral, Connect  
 4 is an "account debtor" vis-à-vis DZ Bank under Article 9 of the Uniform Commercial  
 5 Code ("UCC") as codified in Washington. (*Id.* at 3-8.) Specifically, Connect argues that  
 6 it can assert its counterclaims under § 9-404 of the UCC, which is codified in Washington  
 7 under RCW 62A.9A-404. (*Id.*) If applicable, this provision gives an account debtor  
 8 offset rights against an assignee of an account. As relevant here, RCW 62A.9A-404  
 9 provides:

10 **(a) Assignee's rights subject to terms, claims, and defenses; exceptions.**

11 Unless an account debtor has made an enforceable agreement not to assert  
 12 defenses or claims, and subject to subsections (b) through (e) of this  
 13 section, the rights of an assignee are subject to:

14 (1) All terms of the agreement between the account debtor and assignor  
 15 and any defense or claim in recoupment arising from the transaction that  
 16 gave rise to the contract; and

17 (2) Any other defense or claim of the account debtor against the  
 18 assignor which accrues before the account debtor receives a notification  
 19 of the assignment authenticated by the assignor or the assignee.

20 **(b) Account debtor's claim reduces amount owed to assignee.** Subject  
 21 to subsection (c) of this section, and except as otherwise provided in  
 22 subsection (d) of this section, the claim of an account debtor against an  
 assignor may be asserted against an assignee under subsection (a) of this  
 section only to reduce the amount the account debtor owes.

RCW 62A.9A-404.

1 The trouble with Connect's argument is that it has been rejected by the Ninth  
2 Circuit. In construing the predecessor of § 9-404 of the UCC, the Ninth Circuit has  
3 stated:

4 By its terms, § 9318 [now § 9-404] allows a defense only to suit based on  
5 the assignment of the account. Section [9-404] does not apply when the  
6 suit is for repossession or conversion since the basis for a conversion suit is  
7 the secured party's superior property interest in the inventory itself, not the  
assignment of the account held by the debtor. Thus, so long as the security  
interest continues in the collateral, the inventory financier need not fear §  
[9-404] offsets because an action for conversion is available.

8 *United States v. Handy & Harman*, 750 F.2d 777, 786 (9th Cir. 1984); *see also Farm*  
9 *Credit Servs. of Am. v. Cargill, Inc.*, 750 F.3d 965, 966-67 (8th Cir. 2014). Here, DZ  
10 Bank is bringing a suit alleging conversion by Connect of the Advantage collateral,  
11 which was pledged as security on notes assigned to DZ Bank. (*See* Compl. ¶¶ 97-108.)  
12 Under *Handy & Harman*, the provision of the UCC upon which Connect relies for  
13 standing to bring its counterclaims does not apply to this suit.

14 Further, as DZ Bank points out, Advantage's obligation to DZ Bank is pursuant to  
15 a note, which is a negotiable instrument. The definition of "account debtor" specifically  
16 excludes a "person obligated to pay a negotiable instrument, even if that instrument  
17 constitutes part of chattel paper." RCW 62A.9A-102(a)(3) (account debtor). Connect  
18 does not explain how it could be an "account debtor" when Advantage, the entity from  
19 which Connect obtained the assets in question, could not be an "account debtor." Even  
20 construing Connect's allegations in the light most favorable to Connect, RCW 62A.9A-  
21 404 provides no basis for Connect to assert standing to pursue against DZ Bank what  
22 would otherwise be claims belonging to Advantage.

1 Connect raises no other basis for standing to assert its counterclaims—all of which  
 2 arise out of the alleged fraud visited by Brooke upon Advantage and the other  
 3 franchisees. Accordingly, the court GRANTS DZ Bank’s motion to dismiss Connect’s  
 4 counterclaims under Rule 12(b)(1) for lack of subject matter jurisdiction.<sup>6</sup>

#### 5 **B. Leave to Amend**

6 In the context of a motion to dismiss under Rule 12(b)(1), the court should dismiss  
 7 a complaint or counterclaim without leave to amend if the party could not cure the  
 8 jurisdictional defect by amendment. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316  
 9 F.3d 1048, 1052 (9th Cir. 2003). Dismissal without leave to amend is improper “unless it  
 10 is clear, upon de novo review, that the complaint could not be saved by any amendment.”  
 11 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998) (quoting *Chang v.*  
 12 *Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)). Here, the court concludes that amendment  
 13 would be futile because even if Connect could amend its answer to establish standing and  
 14 subject matter jurisdiction, Connect’s counterclaims would nevertheless be barred by the  
 15 doctrine of *res judicata* and the compulsory counterclaim rule.

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17  
 18 <sup>6</sup> Because the court concludes that it lacks subject matter jurisdiction over Connect’s  
 19 counterclaims due to lack of standing, the court does not reach DZ Bank’s motion to dismiss  
 20 Connect’s counterclaims based on Rule 12(b)(6). Indeed, it would be improper to do so. When a  
 21 court determines that it lacks subject matter jurisdiction over a claim, it has no authority to  
 22 further adjudicate the merits of that claim. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992)  
 (“A final determination of lack of subject-matter jurisdiction of a case in a federal court, of  
 course, precludes further adjudication of it.”). The court, however, does consider the compulsory  
 counterclaim and *res judicata* issues raised by DZ Bank with respect to Connect’s counterclaims  
 solely for purposes of assessing whether granting leave to amend would be futile or not.

1 Connect asserts that DZ Bank’s claims are “subject to all terms of the . . .  
 2 transaction between Advantage[] and Brooke,” and that Connect “is entitled to all  
 3 defenses and counterclaims in recoupment arising from the integrated franchise  
 4 agreement that gave rise to the contract.” (Resp. at 7.) DZ Bank, however, argues that  
 5 even if Connect could allege facts sufficient to provide Connect with standing to pursue  
 6 these claims in Advantage’s stead, the claims would be barred by the doctrine of res judicata  
 7 and the compulsory counterclaim rule. (*See* Mot. at 11-16.) DZ Bank argues that the  
 8 counterclaims asserted by Connect here were compulsory counterclaims that Advantage  
 9 was required to bring in its prior litigation with DZ Bank. However, due to the default  
 10 judgment against Advantage in the prior suit, those counterclaims are now barred. (*Id.*)  
 11 The court agrees.

12 Federal Rule of Civil Procedure 13(a) provides:

13 A pleading must state as a counterclaim any claim that—at the time of its  
 14 service—the pleader has against any opposing party if the claim: (A) arises  
 15 out of the transaction or occurrence that is the subject matter of the  
 opposing party’s claim; and (B) does not require adding another party over  
 whom the court cannot acquire jurisdiction.

16 Fed. R. Civ. P. 13(a). The purpose of Rule 13(a) is to prevent multiplicity of lawsuits and  
 17 to promptly bring about resolution of disputes. *Mitchell v. CB Richard Ellis Long Term*  
 18 *Disability Plan*, 611 F.3d 1192, 1202 (9th Cir. 2010). Where a party has failed to plead a  
 19 compulsory counterclaim, the claim is waived and the party is precluded by the principles  
 20 of res judicata from raising it again. *Id.* (citing *Local Union No. 11, Int’l Bhd. of Elec.*  
 21 *Workers v. G.P. Thompson Elec., Inc.*, 363 F.2d 181, 184 (9th Cir. 1966)). Under the  
 22 principles of res judicata, the bar against raising an unpleaded compulsory counterclaim in a

subsequent suit extends to the party's privies as well. *See Transamerica Occidental Life Ins. Co. v. Aviattion Office of Am., Inc.*, 292 F.3d 384, 392-93 (3d Cir. 2002) (holding that an "'opposing party' in Rule 13(a) should include parties in privity with the formally named opposing parties" in the first lawsuit).

The Prior DZ Bank Action was based on the identical transaction or series of transactions as Connect's counterclaims: Advantage financed the purchase of a Brooke insurance franchise with a loan agreement involving various Brooke entities, including BCC; and DZ Bank, as BCC's assignee, sought to enforce its rights under the note in the Prior DZ Bank Action. (*See generally* Prior DZ Bank Action, Compl.) Indeed, Connect implicitly acknowledges that its counterclaims here arise out of the same transaction or occurrence that was the subject matter of the Prior DZ Bank Action:

DZ Bank's entire claim is premised on its allegation that Connect is obligated under the security agreement for general intangibles and other collateral and proceeds purportedly pledged by Advantage [] to DZ Bank. . . . Thus, DZ Bank's security interest is subject to all terms of the integrated franchise agreement transaction between Advantage []/API and Brooke, and Connect is entitled to all defenses and counterclaims in recoupment arising from the integrated franchise transaction that gave rise to the contract.

(Resp. at 7.)<sup>7</sup> Connect's acknowledgement above necessarily means that the same counterclaims Connect asserts here as related to Advantage's rights under the franchise

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<sup>7</sup> Connect's description of DZ Bank's claim is inaccurate. DZ Bank does not assert that Connect is directly "obligated under the security agreement." (*See* Resp. at 7.) Rather, DZ Bank's claims against Connect are for conversion and unjust enrichment based on Connect's alleged violation of DZ Bank's security interest in the Advantage note. (*See* Compl. ¶¶ 103-08, 113-16.) This distinction, however, does not alter the court's analysis concerning the application of res judicata or the compulsory counterclaim rule.

1 agreement and note would have been compulsory under Rule 13(a) in the Prior DZ Bank  
2 Action in which DZ Bank, as BCC's assignee, was suing Advantage on the note. Thus,  
3 under the authority cited above, Connect is now barred from raising the same  
4 counterclaims in this suit because Connect purports to raise them in Advantage's stead  
5 (although no such right has been adequately pleaded), but Advantage failed to raise them  
6 in the Prior DZ Bank Action.

7 Contrary to Connect's assertions (*see* Resp. at 10-11), the fact that the Prior DZ  
8 Bank Action ended in a default judgment does not change the court's analysis. "Default  
9 judgments are considered 'final judgments on the merits' and are thus effective for the  
10 purposes of claim preclusion." *In re Garcia*, Bank 313 B.R. 307, 311-12 (B.A.P. 9th Cir.  
11 2004) (citing *Howard v. Lewis*, 905 F.2d 1318, 1323 (9th Cir. 1990)). The same is true  
12 with respect to the subsequent assertion of a compulsory counterclaim that should have  
13 been raised in a prior action that was resolved by a default judgment. *See Springs v. First*  
14 *Nat'l Bank of Cut Bank*, 835 F.2d 1293, 1295-96 (9th Cir. 1988) (holding that a claim  
15 was barred because it should have been brought as a compulsory counterclaim in a prior  
16 foreclosure action in which the court awarded a default judgment); *see also Montreal v.*  
17 *Lough*, 612 F.2d 467, 472-73 (9th Cir.1980) (holding that counterclaims were so  
18 "intimately intertwined" with opponent's prior claim that their assertion was barred by  
19 the defendant's failure to assert such claims in the prior British Columbia proceeding and  
20 the res judicata effect of that prior default judgment). The assertion of such  
21 counterclaims is barred—as are Connect's counterclaims here.  
22

1 Finally, Connect attempts to preserve its counterclaim based on Brooke's alleged  
2 forgery of the note with API by arguing that the default judgment in the Prior DZ Bank  
3 Action is void because the allegedly forged instrument, upon which it is based, is void.  
4 (Resp. at 17-18.) No party, however, has moved to set aside the default judgment in the  
5 Prior DZ Bank Action as based on fraud. (*See generally* Prior DZ Bank Action, Dkt.)  
6 The allegation of forgery was simply another compulsory counterclaim that API should  
7 have brought but failed to bring in the Prior DZ Bank Action. As such, Connect's  
8 counterclaim that Brooke allegedly forged the API note is barred by the doctrine of res  
9 judicata or the compulsory counterclaim rule for the same reasons that Connect's other  
10 counterclaims are also barred under these doctrines. *See e.g., Hancock v. Kulana*  
11 *Partners, LLC*, 992 F. Supp. 2d 1053, 1063 n.2 (D. Haw. 2014) (stating that the  
12 plaintiff's claims regarding the forged trustee deed were either actually litigated or could  
13 have been litigated in the prior state court action and thus were barred by res judicata in  
14 the present suit).

15 Based on the foregoing authorities, the court concludes that granting Connect  
16 leave to amend its counterclaims in an effort to correct the jurisdictional deficiency  
17 would be futile. Even if Connect could amend its counterclaims to properly allege  
18 standing based on privity with Advantage or otherwise, its counterclaims would still be  
19 barred under the doctrine of res judicata and the compulsory counterclaim rule.  
20 Accordingly, the court grants DZ Bank's motion to dismiss Connect's counterclaims with  
21 prejudice and without leave to amend.

22 //

### 1        **C. DZ Bank's Motion to Strike Various Affirmative Defenses**

2        DZ Bank also perfunctorily moves to strike various affirmative defenses asserted  
 3 by Connect for the same reasons underlying DZ Bank's motion to dismiss Connect's  
 4 counterclaims. (Mot. at 19-20.) DZ Bank, however, does not provide any authority  
 5 explaining why its standing argument would apply in the context of an affirmative  
 6 defense. Courts generally consider the standing doctrine, which is derived from the  
 7 Article III case or controversy requirements of the Constitution, as it applies to plaintiffs  
 8 or, in this case, counter-plaintiffs. It may be that the standing doctrine is applicable in the  
 9 context of affirmative defenses as well. *See United States v. Neset*, 10 F. Supp. 2d 1113,  
 10 1116 (D.N.D. 1998) ("In raising an affirmative defense, a defendant is seeking the  
 11 jurisdiction of the court to hear its claims as much as a plaintiff and, therefore, standing  
 12 becomes an issue for the defendant as well.") (citing Ninth Circuit authority); *FDIC v.*  
 13 *Main Hurdman*, 655 F. Supp. 259, 268-69 (E.D. Cal. 1987); *but see Wynn v. Carey*, 599  
 14 F.2d 193, 196 (7th Cir. 1979) (holding standing applies only to plaintiffs). Without  
 15 briefing from the parties on this issue, however, the court declines to decide it.

16        In addition, although res judicata or the doctrine of claim preclusion would apply  
 17 to Connect's counterclaims, collateral estoppel or the doctrine of issue preclusion would  
 18 apply to Connect's affirmative defenses because these defenses present "issues" in the  
 19 litigation, rather than separate "claims." The two doctrines, although similar, have  
 20 distinct elements. *See Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320-21 (9th  
 21 Cir. 1992). In particular, res judicata bars all grounds for recovery which could have  
 22 been asserted in a prior suit, whether the grounds were asserted or not. *Id.* at 1320. On

1 the other hand, collateral estoppel requires that the issue to be barred “must have been  
 2 actually litigated in the prior litigation.” *Id.* DZ Bank never explains how the affirmative  
 3 defenses it seeks to strike could have been “actually litigated” in the Prior DZ Bank  
 4 Action, which was resolved by a default judgment. Accordingly, the court finds the  
 5 parties’ briefing inadequate to resolve this issue and therefore denies DZ Bank’s motion  
 6 to strike Connect’s affirmative defenses at this time.<sup>8</sup> The court notes, however, that it  
 7 may be appropriate to revisit the adequacy of Connect’s affirmative defenses at a later  
 8 time, on summary judgment or otherwise.

#### 9 IV. CONCLUSION

10 Based on the foregoing, the court GRANTS in part and DENIES in part DZ  
 11 Bank’s combined motion to dismiss Connect’s counterclaims and strike Connect’s  
 12 affirmative defenses (Dkt. # 15). The court grants DZ Bank’s motion to dismiss

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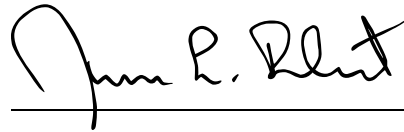
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18 <sup>8</sup> Connect’s briefing on the issue of its affirmative defenses fares no better. With the  
 19 exception of a single footnote addressing the distinction between res judicata and collateral  
 20 estoppel (*see* Resp. at 13 n.5), Connect essentially ignores DZ Bank’s motion to strike and  
 21 provides no specific response to that portion of the motion separate from Connect’s response to  
 22 the motion to dismiss. (*See generally id.*) The court may consider a party’s failure to respond  
 “as an admission that the motion has merit.” Local Rules W.D. Wash. LCR 7(b)(2). However,  
 as noted above, because DZ Bank also briefed the issue poorly and bears the burden here, the  
 court denies DZ Bank’s motion to strike.

Connect's counterclaims with prejudice and without leave to amend, but the court denies DZ Bank's motion to strike Connect's affirmative defenses.<sup>9</sup>

Dated this 17th day of June, 2015.



JAMES L. ROBART  
United States District Judge

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<sup>9</sup> Connect filed a surreply to DZ Bank's reply memorandum. (*See* Surreply (Dkt. # 25).) Local Rule LCR 7(g) permits a party to file a surreply to request that the court strike material contained in an opposing party's reply brief. *See* Local Rules W.D. Wash. LCR 7(g). Any such surreply, however, "shall be strictly limited to addressing the request to strike." *Id.*, LCR 7(g)(2). "Extraneous argument or a surreply filed for any other reason will not be considered." *Id.* Although Connect couches its surreply as a motion to strike material from DZ Bank's reply, it is in fact replete with extraneous argument and therefore filed in contravention of Local Rule LCR 7(g)(2). Indeed, Connect bases its motion to strike on Federal Rule of Civil Procedure 12(f). (Surreply at 1.) This Rule allows the court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). By its terms, Rule 12(f) applies to "pleadings" and not matters contained in the parties' briefs or memoranda. *Id.* Although the court may strike a party's filings pursuant to the court's inherent powers, *see, e.g., Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010), the court finds that there are no grounds to strike the material contained in DZ Bank's reply memorandum. Accordingly, the court DENIES Connect's motion to strike.